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ABSTRACT

Student rights to freedom of speech and the legitimate degrees of control available to principals are discussed in this paper. An overview of pertinent federal litigation focuses on two landmark cases involving oral and written speech, respectively: Bethel School District #403 v. Fraser; and Hazelwood School District v. Kuhlmeier. A conclusion is that principal effectiveness depends partially on knowledge of community standards of acceptable speech and on legal awareness. An addendum describes the Supreme Court decision in June 1990 of Westside Schools v. Mergens, which provides a new degree of student freedom and imposes a burden of conformity on public schools. (9 references) (LMI)

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Kuhlmeier, Fraser

and

# The Legitimate Control of Students

by

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control vs. chaos

KUHLMEIER, FRASER AND THE LEGITIMATE CONTROL OF STUDENTS

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Introduction

Although there is a long historical antecedent that can be traced back through several centuries in a search for the development of freedoms of speech, the First Amendment to the Constitution bears the unmistakable thinking of Mr. Jefferson and Mr. Madison. Members of the social and economic elite of the young America, neither author could have envisioned what adolescent schoolchildren in a public school might be saying or writing 200 years after. Times have changed, and will continue to change, but that succinct and economically worded statement has endured:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Nearing the end of the twentieth century, there is some contest over what constraints, if any, may be imposed on schoolchildren by the administrators of a school.

Strong leadership by the building principal is characteristic of all effective schools. Strong leadership springs from several sources that include understanding of human growth and development, parental

relationships, and applicable law. Effective schools do not allow for chaos or unfairness. From a variety of sources addressing the topic of effective schools, several commonly mentioned characteristics of effective principals emerge. From a longer list, some of those characteristics of effective principals include

1. the establishment of clearly stated goals and priorities for their school;

2. the emergence as the school's instructional leader;

3. the establishment of accountability standards for staff, and for achievement by students;

4. the clarification of behavioral norms for students in the school.

It is the latter item, behavioral norms, which is the focal point for this paper. It is in that area of operation that conflict and disruption tend to occur most often. Recognizing that none of the commonly acknowledged characteristics can be ignored by a principal driving toward enhanced effectiveness in a school, it is still appropriate to scrutinize a part of a totality.

There is applicable law in the area of behavioral norms for students. The focus of this paper is upon the balance between freedom of speech and what a principal may/should do to control student speech, with the goal of maintaining a fair and orderly school. This information is especially pertinent for secondary principals, for they deal with the age group that is grasping and straining for independence. That particular part of an effective principal's job merits consideration in the preparation programs for school administrators. It must be constantly updated and taught by the professors of educational administration, which means that every department of educational administration has an obligation for tracking the statutes

and court cases as they develop.

The rate of change which specifies the latitude of control over students by building administrators has been both rapid and constant in the latter half of this century. What may be done by administrators when faced with a great variety of behavior by students that is determined to be anti social, detrimental to the quality of instruction, preliminary to violence, and so on has come under close scrutiny. More than from the legislative side, the judiciary has engaged several specific questions as they have risen to litigation and by pronouncing on them, have set patterns of administration that tell building principals what they may and what they may not do with students who are behaving outside of generally accepted standards.

Surely, no single case is a better illustration of the ironies that exist for public school building principals than Ingraham v. Wright, 420 U.S. 651 (1977). Addressing the question of corporal punishment, the Court decided that there was nothing in the Constitution to prevent that kind of punishment as one device to control the behavior of students in schools. At about the same time, states were enacting statutes and many local boards were passing policies that stipulated there should be no corporal punishment. That is, the control device that was legal could not be used because it was abolished. (Please note: this is not an analysis of what is most compatible with systems and devices for control over children that have a grounding in psychological research). To specifically identify the irony, what was given at the highest federal level was taken away at the state or local levels.

Other cases that were pointing out directions for school administrators, and those go back at least to Miranda v. Arizona, 377 U.S.

201 (1966), which provides some protection for accused persons in criminal allegations. Although most school problems do not lead in such extreme directions, some do because some aberrant behavior in school is extremely hostile and vicious. Miranda is less important as a specific caution for school administrators than as a case which marked a place in time. After it came such cases as Tinker v. Des Moines Schools 393 U.S. 503 (1969), a case that expanded the rights of students who claimed freedom of speech, who were compelled to attend school. It restricted the decision-making powers of school administrators with regard to anticipated disruptions in school by declaring that public school students are "persons" within the Constitution and entitled to freely express their views in a school setting -- when it did not lead to violent disruption. Goss v. Lopez, 419 U.S. 565 (1975) guaranteed due process for students, even when engaged in violent acts that included assault and arson in a school building. In Wood v. Strickland 420 U.S. 308 (1975), the students responsible for a prank were expelled in violation of their Constitutional rights and the school board was held liable for its exaggerated punishment, while New Jersey v. T.L.O. 105 S. Ct. 733 (1985) provided direction for the search of schoolchildren in situations of suspected criminal contraband, in this case, drugs. In T.L.O., the Court held on the side of safety for other children compelled to attend in that building and supported the administrator's restraining action. Other cases could be cited, and doubtless, building principals have a need to consider that broader, comprehensive picture. Although this paper is specifically devoted to two particular cases, it seemed both necessary and appropriate to perfunctorily identify a very small number of other cases which were selected to show the breadth of case law applications to the present day administration of schools.

State courts also have been active on a variety of topics that affect students in schools. State legislatures have been generous in the number of statutes that add to the specificity of what may -- or may not -- be done in school settings, and the same may be said for many local boards of education. Plainly, there is a steadily increasing series of mandates, from which building administrators must derive the parameters of what they may do in the control of student behavior.

When restraint is imposed and it involves some particular student speech, what is the difference between that restraint and censorship? That is, how can legitimate control be differentiated from censorship?

This "natural" and encouraged condition in which students of high school age begin to be more independent in what they think and say creates tension, because sometimes they are boundary testing. Schools have a legitimacy in society, conferred by both constitutional and statutory law. That legitimacy stretches both directions. It goes far back to a time when small communities, desiring to inculcate certain values and develop skills, voluntarily assembled the children to receive instruction. That instruction had purpose, and content was generally agreed upon by the patrons of the school and the person(s) designated as schoolmaster(s). That legitimacy stretches forward by way of current practices in which substantial power for decision making is delineated from boards of education -- that have the mandated power to govern, to organize and operate schools -- to school administrators. Community values permeate the operation, and part of the whole process of education is to lead children to accept some values, conditions and opinions while others are rejected. In this line of history and organizational structure there is a harmony of expectations that leads to legitimate control, and that control extends to

and includes conflicts in understanding how the First Amendment should be applied to students who are testing the limits of freedom of speech. With delegated power comes responsibility and a principal can hardly be a detached, impartial observer in a condition of high conflict and dispute. Adversarial relationships between students and principal are not the goal, but neither is it a goal in most communities to foster or tolerate a school that is lacking in structures for the development of student behavior at socially acceptable levels. This is a quite different situation from an independent intervention, from a citizen who is self appointed to advise/demand that certain restraints be imposed on student speech. This latter is censorship, voluntarily engaged, and lacking for any standing in either history or legality.

One doesn't have to look deeply into the public school districts of the U.S. to find glaring ambiguities. From the vantage point of educational administration, the Prussian style, authoritarian management concepts so characteristically imposed upon a school which has as one of its primary purposes the inculcation of the principles of democratic citizenship is one such ambiguity. Moreover, that condition in which administrators provide management delineated by cases, policies, and guidelines, and the drive that adolescents have to express their understanding of some of the freedoms of the American polity provide a fertile bed for conflict -- another ambiguity.

Characteristically, state statutory codes devote a chapter to public schools. Authority is conveyed to local agency boards by mandate and many tasks are specific. There is strong similarity among the states about what is said in those "school statutes." Delegation is, most often, by implication; still, examination will always reveal some tasks delegated to

administrators. Combining the implicit and specific tasks, it is clear that substantial delegation of authority has been made to school administrators. Such legitimation of power makes for the legitimation of control within the state's obligation for education, with the exercise of authority performed by the administrators in the local school district, i.e., on the scene. In a paper such as this, it is necessary to rationally establish the reality that school administrators, including building principals, work from a base of legitimate authority.

Authority clearly means the right to command, the right to make decisions, the right to enforce obedience; none of this is by implication. Central to authority is the notion of power; i.e., power over other people. Schools are structures in which principals have authority delegated to them by local boards of education. With that delegation, there is an expectation by the LEA boards that administrators will use that authority. Authority means the management of people. In structures that bear the stamp of legitimacy, school administrators manage students. Still, it is inevitable that some decisions will be contested, that some decisions will be resisted and raised to the level of judicial review for a test of constitutionality.

It is the focus of this paper to concentrate in a specific area, the area being what students may say, orally and in print, and the degrees of control that may be exercised by building principals -- before the fact or after. Two landmark cases have been selected as most germane to this endeavor: Bethel School District #403 v. Fraser, 478 U.S. 675 (7-7-86), and Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1-13-88). These two cases were selected for three reasons. First, dealing with free speech and the First Amendment, they represent one of the most important and most

cherished aspects of American democracy. Second, because they include the possibility of authoritative intervention either before or after the questioned communication, they include an area of sensitive and sensitized decision making for building principals. Third, each case was characterized by a public school district losing a decision in a United States Circuit Court but, upon appeal to the Supreme Court, finding there a vindication of their action on the local scene by a building principal. They form one base which the educational administration professoriate must use as graduate students become informed about operational options and obligations.

Bethel School District #403 v. Fraser

The First Amendment provides for the freedom of speech, religion, press, assembly, and the right of citizens to petition the government, seeking a redress of grievances. It was freedom of speech, delivered orally, that was at issue in Fraser. Alleging that Fraser had acted outside the standards of appropriate speech for students, in violation of school rules, and in disregard of warnings from faculty not to proceed, the LEA lost the issue at the level of the district court, lost it at the circuit court of appeals, and won before the United States Supreme Court.

The facts of the case were that speaking before an assembly of about 600 students, many of whom were not yet 15 years of age, Matthew Fraser delivered a speech that featured sexual innuendo. He was speaking during school hours, nominating a fellow student for a school elective office. Showing the manuscript of the speech before it was delivered, Fraser consulted with several faculty members, some of whom warned him not to deliver the speech as they pointed out why it was inappropriate. Called to

account to an assistant principal on the next day, Fraser admitted that by the use of sexual innuendo, some listeners might consider his speech to be vulgar, obscene, or lewd. From that episode, Fraser was penalized, losing days in school and having his name removed from the list of speakers at the impending graduation ceremonies.

Moving quickly into the District Court to seek relief, that court directed that, because the student's rights to freedom of speech had been violated, the school should pay the damages and legal fees, should reinstate Fraser in school, and should allow him to proceed as a speaker in Commencement.

It is quite possible that the ingeniously constructed metaphor, with its basis in explicit allusions to sexual activity but used to describe the vigor of the political candidate being nominated, deserved admiration for the imagination and creativity that ran through the statement. It could also have been heard as an insult to any female. However, in that auditorium setting, and in the face of the school's disruptive-conduct rule, it was at least suspect as outside the standards of behavior demanded of students in the Bethel Schools. Taking note of Tinker and the First Amendment, the Court proceeded to reverse the Eighth Circuit Court of Appeals, commenting that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." Further, the Court stipulated that "given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code..."

The well known and Bethel public school rule stated

> "In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal

> activities or acts may lead to disciplinary action. Generically, these are acts which disrupt and interfere with the educational process."

Earlier, the judiciary had defined disruptive conduct in schools as follows:

> "**Disruptive Conduct.** Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." 755 F. 2d 1356, 1357.

With those two parts taken together to comprise a standard, the Court then measured the speech which Fraser delivered in support of a candidate for an office in student government:

> "I know a man who is firm -- he's firm in his pants, he's firm in his shirt, his character is firm -- but most ... of all, his belief in you, the students of Bethel, is firm.
>
> "Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts -- he drives hard, pushing and pushing until finally -- he succeeds.
>
> "Jeff is a man who will go to the very end -- even the climax, for each and every one of you.
>
> "So vote for Jeff for A. S. B. vice president -- he'll never come between you and the best our high school can be."

In its rationale, the Court observed that the necessity for controlled proceedings in any comments delivered in an organization had been recognized by no less an advocate of freedom from the rules of government than Mr. Jefferson. It was Jefferson's Manual of Parliamentary Practice which set forward the prohibition of "impertinent" speech and which provided that "no person is to use indecent language against the proceedings of the House (of Representatives)." The Court stated that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the (local) school board."

> "The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic.

> ...It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In Ambach v. Norwick, 441 U. S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."
>
> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."

The Court was split, 7-2, with the majority not completely unified in their decision to reverse the Ninth Circuit Court of Appeals.

Hazelwood School District v. Kuhlmeier

A more recent case than Fraser included questions arising in such areas as prior restraint, identification of the curriculum of a school, acknowledgement of community values that find representation in school policies, and freedom of the press. All of this found its focal point in the First Amendment. Unlike Fraser, which involved oral speech, the Kuhlmeier case involved written speech.

The facts of the case evolved from an incident in which the principal insisted on the deletion of certain stories that had been scheduled for release in The Spectrum, the school newspaper. One story recounted certain personal experiences of pregnant girls in the school; the other told personal accounts of children in a particular family where the parents were

carrying through a divorce proceeding, and in which the account was strongly accusative toward the father. Upon reviewing the paper prior to publication, the principal objected to the name identification of the family and objected to the story of pregnancy on the basis of the immaturity of many of the regular readers of The Spectrum. Staff members of the paper, students in the school filed suit alleging prior restraint in violation of the First Amendment. The Federal District Court ruled for the school; on appeal, the Eighth Circuit Court of Appeals ruled against the school. The U. S. Supreme Court reversed, ruling for the school and commenting that the "First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment."

Stipulating that control over the speech of students by school authority had to be based in legitimate concerns for education, the Court narrowed and refined its broader ruling twenty years earlier in Tinker. The ruling was received with some alarm by the commercial press of the nation, but there is a very clear distinction between how and what a city newspaper may print, and what is reasonable and allowable in a school paper which is a part of the curriculum of that school. In Kuhlmeier, the testimony of the principal revealed that as he met with the student staff to explain his actions, he told them that their stories were "inappropriate, personal, sensitive, and unsuitable." The episode became a classic example of the tensions that exist between First Amendment rights of students and the state's rights to structure educational programs that may include an intent to inculcate certain community values. Angered, the students on the staff of The Spectrum brought suit in federal court.

The Court was able to identify several specific activities in the controversy that have pertinence for any building principal.

> The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.
>
> The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent -- indeed, as one who chose "playing cards with the guys" over home and family -- was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

There are, then, certain kinds of things that may not be said before an immature audience. This is not a new concept in western civilization nor in American culture.

The Eighth Circuit had wrestled with the question of what constituted

a public forum. That is, the First Amendment provides great latitude for what may be said in a public forum. In this instance, the Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide spoke in harmony to the fact that the school paper was a laboratory experience within the journalism classes; i.e., a part of the school curriculum and like all other part of the curriculum, under the jurisdiction of the local governing board. The Circuit Court based much of its holding on its particular interpretation of Tinker, which the Supreme Court said "does not, of course, even accurately reflect our holding in Tinker." Noting, also, that in Fraser it had held that "a school need not tolerate student speech that is inconsistent with its basic educational mission," the justices lined up to reverse the Circuit Court in a 5-3 decision.

> The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The Hazelwood East Curriculum Guide described the Journalism II course as a "Laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.
>
> School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over Spectrum." 607 F. Supp., at 1453.

Finally, it is pertinent to observe that the Court spent some time analyzing the question, What constitutes a forum for public expression? It pointed out that public schools are not public streets, public parks, or other "traditional public forums" that have been used for citizen assembly and communication in the history of the nation. With no public forum having been created, it followed that school officials "may impose reasonable restrictions on the speech of students..."

Commentary and Advisory

Authority and control does not mean repression, but principals in effective schools do work within procedures and routines that are known to faculty and students. Authority includes some restraint, and it does exist in schools for all children, without regard to individuality or socio-economic status. Authority is a carefully balanced effort by every principal who is effective. The difference between a principal being respected or rejected by students resides in the ability to base authority and control in a balance with consideration, compassion, and support. Students of educational administration must master a broad spectrum of professional competencies, which, when blended in a work setting, provide an environment which is safe, rational, and predictable, but which also can attend sufficiently to the special needs of students so that it is perceived as fair and caring by both students and parents. Part of that effective performance by a principal not only rests upon a knowledge of what his/her community holds to be of value in acceptable public speech, but also upon what is lawful, and what is not -- and that is a major segment of the whole broad professional kit which must be taught by professors of educational administration.

ADDENDUM

On 6/4/90 the U.S. Supreme Court decided the case of Westside Schools v. Mergens (#88-1597) and an abridged abstract of that case is appropriate, here. At issue was the Equal Access Act, 98 Stat. 1302, 20 U.S.C. SS 4071-4074 and, specifically, its meaning under the categories of a closed forum, a limited open forum, and an open forum. In an 8-1 decision, the court supplied definitions for the above terms and gave a very limited number of examples that, simplistically, conformed to their definitions. The Court provided a new degree of freedom for students and imposed a new burden of conformity on all public schools. The decision will have direct applications on the extra curriculum -- i.e., the endeavors engaged by students for which no academic credit is given --- in every high school in the nation.

Boards of education will need to review their policies on the extra curriculum and authorizations for use of their buildings; the translation of those policies into administrative guidelines will also merit examination against the Court's decision.

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